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No. 82-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HUBBARD BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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December 6, 1982

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit reasonably concluded that an order of the Federal Communications Commission (the "Commission") was reviewable under Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b) (1976), as "ancillary" to the Commission's radio-licensing power, where the order denied a "package" of applications comprised of a rulemaking petition and application for modification of a construction permit, which were deemed functionally equivalent by the Commission and which presented facts considered by the District of Columbia Circuit on six prior occasions.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The following is a list of all parties that appeared before the court whose judgment is sought to be reviewed: Hubbard Broadcasting, Inc., the Federal Communications Commission and the United States of America, American Broadcasting Companies, Inc., and Jackson and Chaisson Broadcasting Systems, Inc.*

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* In light of the purposes of Rule 28.1, we construe the terms "parent companies," "subsidiaries and affiliates" to mean those corporations (1) whose shares are publicly traded; (2) in the case of "parent companies," which own a majority of the shares of a party; and (3) in the case of "subsidiaries and affiliates," a majority of whose shares are owned by a party.

American Broadcasting Companies, Inc. has no "parent companies," "subsidiaries and affiliates" so defined.

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BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

Respondent American Broadcasting Companies, Inc. respectfully requests that this Court deny the Petition for a Writ of Certiorari filed herein on November 4, 1982, to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 6, 1982.

COUNTERSTATEMENT OF THE CASE

This case dates from 1941 and has been before the United States Court of Appeals for the District of Columbia Circuit six times.[1] This Court has twice denied

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[1] *Hubbard Broadcasting, Inc. v. FCC*, —— U.S. App. D.C. ——, 663 F.2d 220 (1980); *Hubbard Broadcasting, Inc. v. FCC*, 184 U.S. App. D.C. 115, 564 F.2d 600 (1977), *cert. denied*, 435 U.S. 968 (1978); *American Broadcasting-Paramount Theatres, Inc. v. FCC*,

certiorari.[2] As the Commission has observed, "[n]o other station assignment among the thousands so far established has approached this one in the length, complexity, and thoroughness of the consideration that has been accorded in adjudicatory and rulemaking proceedings before the Commission, and in repeated judicial reviews." *Clear Channel Broadcasting in the AM Broadcast Band, Further Notice of Proposed Rule Making*, 70 F.C.C.2d 1077, 1107 (1979).

The long and tortuous history of the "KOB problem" will not be detailed here. It is sufficient to note that in 1976 the Commission terminated a rulemaking commenced in 1945 to resolve that problem. *Clear Channel Broadcasting in the Standard Broadcast Band (KOB/WABC)*, 59 F.C.C.2d 32 (1976) (cited hereinafter as "1976 Report and Order"). Consistent with its treatment of eleven other eastern clear channels, and with due regard for prior court decisions mandating equal treatment for the three national networks,[3] the Commission concluded in the 1976 Report and Order that the public interest would best be served by classifying KOB as a Class II-A station on 770 kHz, directionalized at night to protect the service area of Class I-A Station WABC.[4] The District of Columbia Circuit affirmed the

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120 U.S. App. D.C. 264, 345 F.2d 954 (1965), *cert. denied*, 383 U.S. 906 (1966); *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 108 U.S. App. D.C. 83, 280 F.2d 631 (1960); *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 14 R.R. 2020 (D.C. Cir. 1956); *American Broadcasting Co. v. FCC*, 89 U.S. App. D.C. 298, 191 F.2d 492 (1951).

[2] 435 U.S. 968 (1978); 383 U.S. 906 (1966).

[3] *See American Broadcasting-Paramount Theatres, Inc. v. FCC*, 120 U.S. App. D.C. 264, 345 F.2d 954 (1965), *cert. denied*, 383 U.S. 906 (1966); *American Broadcasting-Paramount Theatres, Inc. v. FCC*, 108 U.S. App. D.C. 83, 280 F.2d 631 (1960).

[4] Due to the unique propagation characteristics of the AM broadcasting service, the nighttime signal of AM stations may be transmitted many hundreds of miles in erratic fashion, presenting poten-

1976 Report and Order,[5] and this Court denied certiorari. 435 U.S. 968 (1978).[6]

Having failed to overturn the Commission's 1976 decision by direct appeal, Petitioner next filed an application for non-directional operation at Albuquerque. That application was rejected as inconsistent with the 1976 Report and Order where the Commission, after exhaustive consideration, had allocated the I-A station on 770 kHz to New York and the II-A station on that frequency to New Mexico. *Hubbard Broadcasting, Inc.*, 44 R.R.2d 1005 (1978), *reconsideration denied*, 71 F.C.C.2d 591 (1979). The D.C. Circuit, in summarily affirming the Commission's order, optimistically concluded that "this forty year old controversy is finally brought to an end." *Hubbard Broadcasting, Inc. v. FCC*, —— U.S. App. D.C. ——, ——, 663 F.2d 220, 223 (1980).

Less than three months after that court affirmance, Petitioner filed a rulemaking petition seeking amendment of Commission Rule 73.22[7] to provide for a Class I-A station in New Mexico. With its rulemaking petition, Petitioner simultaneously filed an application and request for waiver proposing Class I-A operation for Station KOB. The Chief of the Broadcast Bureau dismissed these filings by letter rulings. See *Hubbard Broadcasting, Inc.*, 87 F.C.C.2d 988, 991-94 (1981) (Appendix to the Peti-

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tial interference problems and difficult allocation decisions. For a more detailed discussion of the so-called skywave phenomenon see *Loyola University v. FCC*, —— U.S. App. D.C. ——, ——, 670 F.2d 1222, 1224, n.3 (1982).

[5] *Hubbard Broadcasting, Inc. v. FCC*, 184 U.S. App. D.C. 115, 564 F.2d 600 (1977) (without opinion).

[6] Although the Commission directed KOB, in 1976, to modify its facilities "to specify a nighttime directional pattern and theoretical parameters appropriate to the operation of KOB as a Class II-A station," 59 F.C.C.2d at 46, KOB has not, to date, complied with that directive.

[7] 47 C.F.R. § 73.22 (1981).

tion for a Writ of Certiorari[8] at 12a-17a). In affirming that staff action, the Commission noted that "[b]ecause Hubbard seeks an amendment to § 73.22(a) that would only apply to Station KOB, we agree with the Bureau's letter, and ABC's opposition to the applications for review, that the request for waiver of § 73.22(a) and the petition for amendment to § 73.22(a) are functionally equivalent. We therefore regard the applications for review as complaining of one action . . . ." *Id.* at 989, n.2 (Pet. App. at 8a, n.2).

Petitioner sought review of the Commission order, which affirmed the dismissal of its application and rule-making petition, by the United States Court of Appeals for the Eighth Circuit. That court dismissed the appeal on the grounds that the "FCC's denial of Hubbard's 'package' of applications was, as a matter of substance, the exercise by FCC of its 'radio-licensing power' reviewable under Section 402(b)." *Hubbard Broadcasting, Inc. v. FCC*, 684 F.2d 594, 596 (8th Cir. 1982) (Pet. App. at 5a). The court further stated "that to permit Hubbard to split off a part of the 'package' in a transparent attempt to obtain jurisdiction in a forum other than the Court of Appeals for the District of Columbia, which has twice ruled against reclassifying KOB and WABC as directionalized stations on 770 kHz, would frustrate the clear intent of Congress that judicial review of all cases involving FCC's 'radio-licensing power' be limited to the United States Court of Appeals for the District of Columbia." *Id.* at 596-97 (Pet. App. at 5a).

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[8] Hereinafter cited as "Pet. App."

ARGUMENT

Review by This Court Is Not Warranted Since the Case Presented Involves Unique Factual Circumstances Which Have Been Considered by the District of Columbia Circuit Six Times and Which Have Been Before This Court on Two Prior Occasions

As the rules of this Court make clear, "a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor." Sup. Ct. R. 17.1. The Petitioner fails to advance any significant questions that warrant review by this Court and, under the standard set by Rule 17.1, the subject petition should be denied.

This case presents unique factual circumstances, as more fully detailed above, which have been considered by the Commission and the courts on numerous occasions. Since 1976, in fact, the District of Columbia Circuit has twice considered and rejected essentially the same facts and arguments which are presented here. In light of this excessive judicial scrutiny, review by this Court would serve no purpose besides prolonging the already lengthy history of this case and further delaying KOB's compliance with the Commission's 1976 directive.

Given the unique nature of the underlying facts, this case does not present an appropriate occasion to define the scope of Section 402(b). The "package" of applications filed by Petitioner is unlikely to recur, having been one of a variety of tactics utilized since 1976 to delay construction of the specified facilities and, essentially, to seek reconsideration of the Commission's 1976 decision to classify KOB as a Class II-A station. Indeed, the Commission itself viewed the rulemaking petition and application as "functionally equivalent," noting that the rule change sought by Petitioner would apply only to Stations KOB and WABC. 87 F.C.C.2d at 989, n.2

(Pet. App. at 8a, n.2). On these facts, no "important question of federal law" [9] has been raised meriting review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[9] Sup. Ct. R. 17.1(c).